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**XPO Cartage, Inc. and International Brotherhood of Teamsters.** Cases 21–CA–150873, 21–CA–164483, 21–CA–175414, and 21–CA–192602

August 20, 2020

ORDER<sup>1</sup>

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 14, 2020, Administrative Law Judge Christine E. Dibble issued an Order requiring that the supplemental hearing in the above-captioned case be conducted by videoconference, finding that the current Coronavirus Disease (COVID-19) pandemic constitutes “compelling circumstances” warranting a remote hearing via videoconference. Thereafter, in accordance with Section 102.26 of the Board’s Rules and Regulations, the Respondent filed the instant request for special permission to appeal the judge’s July 14 Order. The Charging Party filed a response in support of the special appeal, and the General Counsel filed a response taking no position.

Having duly considered the matter, we grant the Respondent’s request for permission to file a special appeal, but we deny the appeal on the merits. For the reasons discussed below, and as set forth more fully in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), we find that the Respondent has failed to establish that conducting the hearing via videoconference would deny it due process. To the extent that a party has nonspeculative concerns that arise during the course of the video hearing, it may raise them to Judge Dibble in the first instance, without prejudice to its right to file exceptions with the Board to any adverse rulings pursuant to Section 102.46 of the Board’s Rules and Regulations.

Initially, we reject the Respondent’s assertion that proceeding with a videoconference hearing threatens the parties’ due process or other cognizable rights. As discussed at greater length in *William Beaumont Hospital*, nothing in the Constitution, the Act, nor the Board’s Rules and Regulations *per se* prohibit holding an unfair labor practice hearing via videoconference technology.

*William Beaumont Hospital* applied the framework of Section 102.35(c) to permit a hearing via videoconference “[u]pon a showing of good cause based on compelling circumstances, and under appropriate safeguards.” The Respondent dismissively characterizes the judge’s

order as based on “convenience or expediency.” However, accommodations driven by the worst public health crisis in the last century are more than mere convenience, and the Respondent has failed to establish that the Board should not construe the pandemic as a compelling circumstance. See *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 2 (2020) (“[T]he current Coronavirus Disease (COVID 19) pandemic constitutes ‘compelling circumstances’ warranting a remote preselection hearing.”). Moreover, continuing the case until circumstances no longer compel a video hearing could result in an indefinite delay in the proceeding, given the uncertain forecast for the ongoing pandemic.

Likewise, there is no merit to the Respondent’s contention that Section 102.35(c) precludes the judge from directing a videoconference hearing, absent a party’s request pursuant to Section 102.35(c)(1). While Section 102.35(c)(1) provides one avenue for the judge to permit remote witnesses to testify, it is not the only one. *Morrison*, slip op. at 1, fn. 2, counsels that Section 102.35(c), while instructive, is not controlling in a hearing conducted entirely by videoconference. Further, we explained in *William Beaumont Hospital* that judges enjoyed discretion to order a videoconference hearing in appropriate circumstances pursuant to their authority to “regulate the course of the hearing” under Section 102.35(a)(6) of our rules. And, to the extent the judge’s action is in tension with Section 102.35, or any other Board rule or regulation, the Board is permitted to apply its rules flexibly to meet the demands of a given case. See *NLRB v. Grace Co.*, 184 F.2d 126, 129 (8th Cir. 1950) (“The Board is not the slave of its rules.”); Section 102.121 of the Board’s Rules and Regulations (stating that the Board will “liberally construe[]” its rules “to effectuate the purposes and provisions of the Act”).

It appears that the Respondent’s primary concern is that a videoconference hearing will impair the judge’s ability to engage in nuanced credibility determinations, particularly because many of the witnesses will require Spanish-speaking translators. In addition, the Respondent anticipates that the inherent time delay caused by video technology will create substantial difficulties. The Charging Party advances similar concerns, and it additionally argues that video technology raises the possibility of witness tampering through means undetectable to other parties; impedes a witnesses’ review of pertinent documents; suffers from a witness’s potential inability to access suitable technology; and/or will be beset with technical glitches.

Those concerns of both parties are, at this stage, speculative. Further, no party has shown that advances in current videoconferencing technology will not be able to

<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

address many, if not all, of their procedural concerns. Certainly, Judge Dibble has the discretion to determine whether the case is too complex; cumbersome; or witness document-, and fact-heavy to be heard remotely.<sup>2</sup> And, to the extent that any party to the proceeding has a concrete, not speculative, concern that cannot be ameliorated by the videoconferencing technology, or other pretrial accommodations or stipulations among the parties, any party may raise it to Judge Dibble in the first instance, or on exceptions to the Board pursuant to Section 102.46 of the Board's Rules and Regulations, in the event the party receives an adverse ruling.

Dated, Washington, D.C. August 20, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

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<sup>2</sup> Thus, if the judge finds herself unable to make credibility determinations in a video environment, she has the discretion to handle the situation accordingly.